

FILED

JUN 03 2005

HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY *William*

**BEFORE A HEARING OFFICER
OF THE SUPREME COURT OF ARIZONA**

IN THE MATTER OF AN INACTIVE) Nos. 03-0263, 04-0158, 04-1495
MEMBER OF THE STATE BAR OF)
ARIZONA,)
)
ALAN B. SHAW,)
Bar No. 012882)
) **HEARING OFFICER'S REPORT**
RESPONDENT.)

PROCEDURAL HISTORY

A Complaint was filed on July 26, 2004. Respondent filed an Answer on September 15, 2004. The parties filed a Tender of Admissions and Agreement for Discipline by Consent and a Joint Memorandum in Support of Agreement for Discipline by Consent on October 29, 2004. A hearing was not held. The Commission reviewed the matter on February 12, 2005. The Commission rejected the consent documents and remanded the matter to this Hearing Officer on March 11, 2005. The parties filed a Second Tender of Admissions and Agreement for Discipline by Consent (Tender) and a Joint Memorandum in Support of Second Agreement for Discipline by Consent (Joint Memo) on April 27, 2005. A hearing on the Tender and Joint Memo was held on May 2, 2005.

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1 to contact the Director of the Lawyer Assistance Program within 20 days from the
2 date the Order was mailed to Respondent. The order was mailed to Respondent
3 on January 6, 2004. Respondent did not contact anyone at the State Bar regarding
4 the Order of Diversion. The Director of the Lawyer Assistance Program made
5 two courtesy phone calls to Respondent, which were not returned. Bar counsel
6 tried several times to contact Respondent regarding the Order of Diversion and
7 file no. 04-0158, but Respondent did not return bar counsel's calls. On April 14,
8 2004, bar counsel directed the State Bar's staff investigator to locate Respondent.
9 On April 16, 2004, the staff investigator provided a home address, telephone
10 number, and e-mail address for Respondent. Thereafter, bar counsel left a voice-
11 mail message, and an e-mail message directing Respondent to contact bar counsel
12 regarding the Order of Diversion for file no. 03-0263, and the complaint filed
13 against him in file no. 04-0 158.

14 On April 19, 2004, bar counsel sent Respondent (by e-mail) a notice of
15 non-compliance with the Order of Diversion for file no. 03-0263, and notice of
16 failure to respond to charges filed against him in file no. 04-0158. On May 5,
17 2004, bar counsel again sent Respondent (by e-mail and first-class mail) a notice
18 of non-compliance with the Order of Diversion for file no. 03-0263, and notice of
19 failure to respond to charges filed against him in file no. 04-0 158. The May 5,
20 2004 mailings were not returned to the State Bar.

1 On June 28, 2004, upon recommendation of bar counsel, the Probable
2 Cause Panelist issued an Order Vacating the December 8, 2003 Order of
3 Diversion and entering an Order of Probable Cause against Respondent.
4 Respondent's conduct as described in Count One violates Rule 42, Ariz.R.S.Ct.,
5 specifically ER 1.2 (failure to abide by client's decisions), 1.3 (diligence), 1.4
6 (failure to keep client informed), 3.2 (failure to expedite litigation), ER 3.4(c)
7 (failure to obey an order of a tribunal), 8.4(d) (prejudice the administration of
8 justice) (effective through Nov 30, 2003); and, Rules 53(d) and (f) (failure to
9 cooperate with or furnish information to the State Bar).

12 **COUNT TWO (FILE NO. 04-0158)**

13
14 CaMargo Damrow retained Respondent in 2001 for her bankruptcy matter.
15 Ms. Damrow claims that she paid Respondent \$675.00. At the time Ms. Damrow
16 retained Respondent, she had a pending disability claim. Ms. Damrow claims, but
17 Respondent denies, that Respondent counseled Ms. Damrow to delay filing for
18 bankruptcy until her disability claim was finalized.

20 In 2001, after Ms. Damrow's disability proceeding concluded, she
21 contacted Respondent regarding her bankruptcy. Respondent instructed Ms.
22 Damrow that he would secure a hearing date for her in Casa Grande. Ms.
23 Damrow has heard nothing further from Respondent. Respondent has not
24 returned Ms. Damrow's fees.
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1 Ms. Damrow submitted her Bar Complaint on January 26, 2004. On March
2 19, 2004, bar counsel sent a charging letter directing Respondent to respond to
3 Ms. Damrow's charges within 20 days. Respondent did not respond to bar
4 counsel's March 19, 2004 charging letter.
5

6 The State Bar attempted to contact Respondent with regard to file no. 04-
7 0158. On May 13, 2004, bar counsel sent a letter to Respondent directing him to
8 respond to Ms. Damrow's charges within 20 days or bar counsel would submit the
9 matter to formal proceedings. Respondent did not respond to that letter. Bar
10 counsel attempted to contact Respondent regarding the Damrow matter
11 contemporaneously and in conjunction with attempts to contact Respondent about
12 his failure to abide by the terms of the order of diversion described in Count One,
13 of this Tender. The State Bar has no record of Respondent responding to the State
14 Bar's efforts to contact him about file no. 04-01 58. Respondent's conduct as
15 described in Count One violates Rule 42, Ariz.R.S.Ct., specifically ER 1.2
16 (failure to abide by client's decisions), 1.3 (diligence), 1.4 (failure to keep client
17 informed), 1.16 (improper withdrawal), and 3.2 (failure to expedite litigation)
18 (effective through Nov 30, 2003); and Rules 53(d) and (f) (failure to cooperate
19 with or furnish information to the State Bar).
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1 **MATTERS NOT INCLUDED IN THE FORMAL COMPLAINT**
2 **(FILE NO. 04-1495)**

3 On August 9, 2004, the Hon. Peter C. Reinstein, Maricopa County Superior
4 Court Judge, presided over a hearing on an order to show cause initiated by Jack
5 H. Hirsch, counsel for Plaintiff in *Martha Carrillo vs. David Alan Reifman*,
6 Maricopa County Sup. Ct. case no. CV 2003-000749. According to the record
7 transcript of the hearing, the court ordered Respondent to appear and show cause
8 why he should not be held in contempt for failing to complete his duties as a
9 court-appointed arbitrator.
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11
12 Mr. Hirsch testified that the arbitration had been held five months before
13 the August 9, 2004 hearing date. As of the date of the hearing, Respondent had
14 not issued a decision and failed to respond to attempts by Mr. Hirsch to
15 communicate with Respondent about the status of the case on April 28, 2004.
16 Respondent failed to appear for the show cause hearing. The court appointed a
17 new arbitrator. Mr. Hirsh testified that he did not oppose appointment of a new
18 arbitrator, but that the delay caused by appointing a new arbitrator would
19 prejudice his client. The court found Respondent in contempt for failure to appear
20 and failure to file an arbitration decision and fined him \$500.00. Respondent
21 violated Rule 42, ERs 1.2, 1.3, 3.2, 3.4 and 8.4(d), and Rule 5 3(c).
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1 Bar agrees to dismiss the allegation that Respondent violated ER 1.5 (excessive
2 fees).

3 ABA STANDARDS

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5 The ABA *Standards* list the following factors to consider in imposing the
6 appropriate sanction: (1) the duty violated, (2) the lawyer's mental state, (3) the
7 actual or potential injury caused by the lawyer's misconduct, and (4) the
8 existence of aggravating or mitigating circumstances. ABA *Standard* 3.0.
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10 The parties indicated that *Standards* 4.4, 7.0 and 8.0 are the most
11 applicable in this matter. A review of ABA *Standard* 4.0 (Violations of Duties
12 Owed to Clients) indicates that suspension is the presumptive sanction for
13 Respondent's misconduct. *Standard* 4.42 (Lack of Diligence) specifically
14 provides:
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16 Suspension is generally appropriate when:

- 17 (a) a lawyer knowingly fails to perform services for a client
18 and causes injury or potential injury to a client; or
19 (b) a lawyer engages in a pattern of neglect and causes
injury or potential injury to a client.

20 In this matter, Respondent failed to follow up on promises that he made to
21 Ms. Heard (Count One) about her bankruptcy matter, for which Respondent
22 received a diversion requiring him to participate in the State Bar's LOMAP
23 program. Since entry of the Order of Diversion, two additional matters were
24 reported to the State Bar, Respondent's neglect of Ms. Damrow's (Count Two)
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1 bankruptcy matter, and Respondent's failure to complete his duties as a court-
2 appointed arbitrator. Respondent also failed to comply with the terms of the
3 Order of Diversion by failing to contact the Director of LOMAP as prescribed in
4 the order. Respondent has neglected three matters for which he accepted legal
5 responsibility which arguably constitutes a pattern of neglect meriting suspension.
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7 AGGRAVATING AND MITIGATING FACTORS

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9 This Hearing Officer then considered aggravating and mitigating factors in
10 this case, pursuant to *Standards* 9.22 and 9.32, respectively. This Hearing Officer
11 agrees with the parties that there are four factors present in aggravation in this
12 matter.
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14 (a) prior disciplinary offenses;

15 (d) multiple offenses;

16 (h) vulnerability of victim; and,

17 (i) substantial experience in the practice of law.
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19 This Hearing Officer agrees with the parties that four factors are present in
20 mitigation.
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22 (b) absence of a dishonest or selfish motive;

23 (e) full and free disclosure to disciplinary board or cooperative attitude
24 toward proceedings;
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1 (k) imposition of other penalties or sanctions; and

2 (l) remorse.

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4 **PROPORTIONALITY REVIEW**

5 To have an effective system of professional sanctions, there must be
6 internal consistency, and it is appropriate to examine sanctions imposed in cases
7 that are factually similar. *In re Shannon*, 179 Ariz. 52, 71, 876 P.2d 548, 567
8 (1994) (quoting *In re Wines*, 135, Ariz. 203, 207 (1983)). However, the
9 discipline in each case must be tailored to the individual case, as neither
10 perfection nor absolute uniformity can be achieved. *Matter of Riley*, 142 Ariz.
11 604, 615 (1984).
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14 In *In re McCarthy*, SB-01-0121-D (2001), the lawyer was the subject of a
15 three-count complaint alleging his failure to communicate with his clients, a
16 failure to act with reasonable diligence and the failure to respond to the State Bar
17 in its investigation of the matter. McCarthy was suspended for two years for his
18 misconduct. Three factors were considered in aggravation: a pattern of
19 misconduct, multiple offenses and bad faith obstruction of the disciplinary
20 process. McCarthy's lack of a disciplinary history was a mitigating factor.
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23 In *In re Sammons*, SB-03-0150-D (2003), the lawyer agreed to a censure
24 and a one-year term of probation including LOMAP and MAP for failure to carry
25 out his duties as a conservator, and failure to diligently represent clients in other

1 matters in violation of ERs 1.3, 1.4, 1.15 and 8.4(d) and Rule 51(k). Aggravating
2 factors included pattern of misconduct, multiple offenses, and substantial
3 experience in the practice of law, while mitigating factors included absence of
4 disciplinary history, absence of selfish or dishonest motive, full and free
5 disclosure, and remorse.

7 In *In re Stevens*, SB-03-0148-D (2003), the lawyer agreed to a censure and
8 probation including LOMAP for failure to diligently represent a client and failure
9 to cooperate with the State Bar investigation in violation of ERs 1.3, 1.4 and
10 8.4(d) and Rule 51(h). Aggravating factors included prior disciplinary history,
11 pattern of misconduct, multiple offenses, and substantial experience in the
12 practice of law, while mitigating factors included absence of selfish or dishonest
13 motive and personal and emotional problems.

16 In *In re Estrada*, SB-02-0044-D (2002), the lawyer agreed to a censure for
17 failure to diligently represent and communicate with one client, failure to respond
18 to status inquiries of medical service providers, failure to advise medical
19 providers that their cases had settled, failure to timely pay medical providers, and
20 failure to respond to the State Bar's investigation of three matters, violations of
21 ERs 1.3, 1.4, 1.15, 1.16, 5.1 and 8.1. Aggravating factors included multiple
22 offenses, bad faith obstruction, and substantial experience in the practice of law,
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1 while mitigating factors included, no prior disciplinary history, lack of selfish or
2 dishonest motive, and physical or mental disability, and remorse.

3
4 The Supreme Court has long recognized that the degree of harm wrought
5 by a lawyer's conduct is a factor to consider in determining the appropriate
6 sanction. The consequence of Respondent's neglect of both the Heard and
7 Damrow matters is rather limited. Neither Ms. Heard nor Ms. Damrow lost a
8 legal right as the result of Respondent's failure to follow through with their
9 representation. With regard to Ms. Heard, Respondent failed to follow through
10 with promises made regarding some housekeeping matters after the underlying
11 matter had concluded. With regard to Ms. Damrow, Respondent neglected to
12 follow up with Respondent about the appropriate timing for the filing of her
13 bankruptcy matter. Ms. Damrow obtained follow-on counsel and proceeded with
14 the bankruptcy. Although Respondent's neglect of his duties as a court-appointed
15 arbitrator caused substantial harm by forcing the parties to the arbitration to try
16 the matter a second time, Respondent has already been cited for contempt and
17 fined by the court.

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19 Respondent has voluntarily closed his law practice and transferred to
20 inactive status. The State Bar has no reason to believe that Respondent continues
21 to be a threat to the public.
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1 Respondent has also paid restitution of all monies claimed by
2 Complainants Ms. Heard and is attempting to pay restitution to Ms. Damrow even
3 though he believes that the amount claimed by Ms. Damrow is not accurate.
4 Respondent has also paid his court fine. The agreed upon term of probation is
5 calculated to provide for protection of the public in the event that Respondent
6 returns to active status and resumes the practice of law.
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8 RECOMMENDATION

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10 The purpose of lawyer discipline is not to punish the lawyer, but to protect
11 the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859
12 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the
13 public, the profession and the administration of justice. *In re Neville*, 147 Ariz.
14 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in
15 the bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 29, 881 P.2d 352, 361
16 (1994).
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19 In imposing discipline, it is appropriate to consider the facts of the case, the
20 American Bar Association's *Standards for Imposing Lawyer Sanctions*
21 ("*Standards*") and the proportionality of discipline imposed in analogous cases.
22 *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994).
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24 Upon consideration of the facts, application of the *Standards*, including
25 aggravating and mitigating factors, and a proportionality analysis, this Hearing

1 Officer recommends acceptance of the Tender of Admissions and Agreement for
2 Discipline by Consent and the Joint Memorandum in Support of Agreement for
3 Discipline by Consent providing for the following:
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5 1. Respondent shall be suspended for a period of 90 days.

6 2. As a condition precedent to Respondent's return to active status and the
7 practice of law, Respondent shall contact the State Bar's Law Office
8 Management Assistance Program (LOMAP) Director and schedule a LOMAP
9 and a MAP assessment.
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11 3. Respondent shall be placed on probation for a period of two years
12 effective upon the signing of the probation contract. Bar Counsel will notify the
13 Disciplinary Clerk of the date on which the probation begins. The terms of
14 probation are as follows:
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16 a. Respondent shall participate in MAP and LOMAP and comply with
17 all recommendations of the LOMAP and MAP director or her designee.
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19 b. In the event that Respondent fails to comply with any of the
20 foregoing conditions, and the State Bar receives information, bar counsel shall
21 file with the Hearing Officer a Notice of Non-Compliance, pursuant to Rule
22 60(a)5, Ariz. R. S. Ct. The Hearing Officer shall conduct a hearing within thirty
23 days after receipt of said notice, to determine whether the terms of probation
24 have been violated and if an additional sanction should be imposed. In the event
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3 proof shall be on the State Bar of Arizona to prove non-compliance by clear and
4 convincing evidence.

5 4. Respondent shall pay restitution in the amount of \$675.00 to Ms.
6 Damrow (Count Two). Respondent shall furnish Bar Counsel with proof of
7 payment within sixty (60) days of the Supreme Court's final order and
8 judgment. If Respondent is unable to locate Ms. Damrow, then Respondent
9 shall provide Bar Counsel with a sworn statement detailing Respondent's
10 efforts to locate Ms. Damrow, in which event the State Bar reserves the right to
11 conduct further research and instruct Respondent on how to pay the restitution.
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14 5. Respondent shall pay the costs and expenses incurred in this
15 disciplinary proceeding.

16 DATED this 3RD day of June, 2005.

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18 
19 Stanley R. Lerner
20 Hearing Officer TV

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22 Original filed with the Disciplinary Clerk
23 this 3RD day of June, 2005.

24 Copy of the foregoing was mailed
25 this 3RD day of June, 2005, to:

1 J. Scott Rhodes
2 Respondent's Counsel
3 *Jennings, Strouss & Salmon, P.L.C.*
4 The Collier Center, 11th Floor
5 201 East Washington Street
6 Phoenix, AZ 85004-2385

7 Michael N. Harrison
8 Bar Counsel
9 State Bar of Arizona
10 4201 North 24th Street, Suite 200
11 Phoenix, AZ 85016-6288

12 by: PWilliams